No. 11,966

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

J. J. NEWBERRY COMPANY, a corporation,

Appellant,

vs.

MERTON L. CRANDALL and ETTA CRANDALL, his wife,

Appellees.

Appeal from the United States District Court for the District of Arizona

---

BRIEF OF APPELLEES

BROWN & LANGERMAN
44 No. 1st Avenue
Phoenix, Arizona

Attorneys for Appellees

McGREW COMMERCIAL PRINTERY, PHOENIX, ARIZONA

No. 11,966

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

J. J. NEWBERRY COMPANY, a corporation,

Appellant,

vs.

MERTON L. CRANDALL and ETTA CRANDALL, his wife,

Appellees.

Appeal from the United States District Court for the District of Arizona

BRIEF OF APPELLEES

BROWN & LANGERMAN
44 No. 1st Avenue
Phoenix, Arizona

Attorneys for Appellees

INDEX

I N D E X—(Continued)

Page

I N D E X—(Continued)

I N D E X—(Continued)

I N D E X—(Continued)

AUTHORITIES CITED

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. J. NEWBERRY COMPANY, a corporation, *Appellant,* vs. MERTON L. CRANDALL and ETTA CRANDALL, his wife, *Appellees.*		No. 11966

BRIEF OF APPELLEES

The parties herein will be referred to by their designations in the Circuit Court; that is, Defendant as Appellant and Plaintiffs as Appellees. Reference to the Transcript of Record will be indicated by the letter "T" followed by page number.

STATEMENT OF THE CASE

While Appellees do not controvert the statement of the case in Appellant's brief, an amplification thereof might facilitate consideration of the case by the Court.

On February 11, 1946, Appellee, Etta Crandall, entered Appellant's store to purchase tissues. She was a resident of Hudson, Michigan, having been in Phoenix, Arizona, for only three days, and had never before visited Appellant's store (T-41). She entered the store

from the Washington Street entrance (T-41), the doorway of which is on the same level or grade as the sidewalk adjoining the store (T-6, T-10). After being advised that Appellant had no tissues, Mrs. Crandall started to leave the store by the entrance on First Avenue (T-42). Prior to the time that she reached the First Avenue doorway, nothing unusual happened to her, nor did she slip, slide or fall in any way prior to reaching said doorway (T-92). Upon reaching the doorway, her left foot struck an obstruction, causing her to fall through the entrance and to be hurled forward on the sidewalk, breaking her left hip (T-42, T-44). She was taken to St. Monica's Hospital, where she remained under the care of Dr. Matthew Cohen for about eleven weeks (T-46), after which she was taken back to her home, where she remained in bed for another month (T-47).

On April 12, 1947, Appellees filed their complaint in the Superior Court of Maricopa County, Arizona, against the Appellant and subsequently the Appellant had the cause removed to the District Court of the United States in and for the District of Arizona, on the ground of diversity of citizenship.

On April 6, 1948, the case came on for trial before a jury, and at that time Appellee, Etta Crandall, testified in the manner indicated above. She added that at the time of the accident she was walking out of the First Avenue entrance "in a normal manner" (T-46), and that while she did not see the obstruction which her foot struck, she felt it (T-93).

Marie Cooley and Donna Mae Cooley testified that they saw Mrs. Crandall as she was falling and that while they did not know the cause of the fall that at the time they first saw Mrs. Crandall she was coming

through the doorway of the First Avenue entrance of the Newberry Store and was falling (T-33, 34. T-36, 37).

Appellee, Merton L. Crandall, testified that on the same day and immediately after the accident, he examined the First Avenue entrance (T-52); that he had been an engineer for 25 or 30 years, and had during that entire period worked with practically all types of metals (T-50, 51); that the threshold in the First Avenue doorway was made of three metal sections which were anchored there with screws and that there were some pieces chipped out of the threshold (T-52); that he was able to tell from his examination of the chips that they were of an old origin (T-53, 54); that one of the chipped out places in sizes was 1½ inches or 1¾ inches and the other 2⅜ inches (T-59), each of them extending from the inner edge of the threshold back toward the center. These chipped out places were not symmetrical and therefore cannot be properly dimensioned (T-112), but they were "chunks . . . broken right out (T-58);" that the ends of the three metal plates were not flush as they should have been, but instead the corners stuck up and were cocked and did not fit together like one solid piece (T-52, 53); that all of these defects had been caused by an improper assembly of the three pieces of metal which formed the metal threshold and that the uneven fittings of the three pieces had resulted through long usage in the chipping out of the metal corners, resulting in the holes in question (T-59, 60); that the metal threshold of the First Avenue entrance looked about the same on the day of the trial as it had on the day of the accident (T-56); "the general look—the general picture of the thing is the same as it was at that time." (T-91)

In the light of this testimony and by stipulation of counsel, the jury were, during the course of the trial, given a view of the threshold involved in the accident (T-113).

Mr. Charles C. Huffman, Manager of the Newberry Store, testified that the construction of the First Avenue entrance of the store was the same on February 11, 1946, as it had been since 1938, without any changes or alterations having been made (T-39).

Dr. Matthew Cohen testified that Mrs. Crandall suffered a broken hip and had about 33⅓% permanent total disability of her left lower extremity, as well as an inch of shortening in the said extremity.

After Appellees rested, Appellant's motion for directed verdict was denied and Appellant then offered evidence regarding the time when the chips in the doorway first appeared. Appellant's witnesses testified that the chips in the threshold were not there on the day of the accident (T-101, 106, 113, 116), and that they were first noticed by Appellant's manager around July, 1947 (T-101). Exhibit "B" in evidence, prepared by Appellant's witness Joe Scott, shows the dimension of the metal threshold and locates the three chips therein, and Appellant's approximation of the size of same, as of January, 1948 (T-112). Appellant further offered evidence that at all times during store hours there are within a radius of 20 feet from the First Avenue entrance nine 300-watt lights burning (T-116, 117).

Appellant having completed its case, Appellees then put on the rebuttal testimony of Mrs. Elvira Magnusson, who testified that on March 20, 1946, she examined the First Avenue entrance to the Newberry Store (T-121); that immediately thereafter she made some notes

covering this examination, and that she had just recently looked at these notes to refresh her memory (T-122); that in the course of her examination she noticed two holes on the inner ledge of the First Avenue entrance, and irregularities and a raised part where the ridges were joined together (T-122).

After Appellant's renewed motion for directed verdict was denied (T-120), the matter was argued to the jury. The Court then instructed the jury as to the law. The jury then retired and after consideration returned its verdict in favor of the Appellees.

ARGUMENT

In support of their contention that the verdict and judgment of the District Court be affirmed, Appellees submit as their first proposition of law that:

IN DETERMINING WHETHER THE ACTION OF A TRIAL COURT, IN DENYING A MOTION FOR A DIRECTED VERDICT, IS ERROR, THE REVIEWING COURT WILL GIVE THE EVIDENCE THE MOST FAVORABLE CONSTRUCTION AND CONSIDER IT IN THE MOST FAVORABLE ASPECT TO THE APPELLEES, OF WHICH IT IS REASONABLY SUSCEPTIBLE AND WILL ASSUME AS ESTABLISHED ALL THE FACTS THAT THE EVIDENCE SUPPORTING THE APPELLEES' CLAIMS REASONABLY TENDS TO PROVE AND WILL DRAW IN FAVOR OF THE APPELLEES ALL THE INFERENCES FAIRLY DEDUCIBLE FROM SUCH FACTS.

The second proposition of law which Appellees will urge is that:

A STOREKEEPER HAS THE DUTY TOWARD ANY BUSINESS VISITOR TO ASCERTAIN THE ACTUAL CONDITION OF THE PREMISES AND, HAVING DISCOVERED ANY DEFECTS, EITHER TO CORRECT THEM BY REPAIR OR TO GIVE WARNING OF THE CONDITION AND THE RISK INVOLVED; AND A BUSINESS VISITOR, BEING ENTITLED TO EXPECT THIS CONDUCT ON THE PART OF A STOREKEEPER, IS NOT REQUIRED TO BE ON THE ALERT TO DISCOVER DEFECTS.

In connection with this proposition of law, Appellees will discuss Appellant's proposition of law No. 2 (Appellant's brief PP. 19-23).

Our third proposition of law is that:

THE QUESTION OF WHETHER A DEFECT, NO MATTER HOW SLIGHT, CONSTITUTES NEGLIGENCE, SHOULD BE SUBMITTED TO THE JURY IN ALL CASES IN WHICH IT APPEARS THAT REASONABLE MEN MIGHT ARRIVE AT DIFFERENT CONCLUSIONS.

This proposition will be argued in connection with Appellees' discussion of Appellant's proposition of law No. 3 (Appellant's Brief PP. 23-26).

In connection with Appellant's proposition of law No. 1, (Appellant's brief PP. 11-19) Appellees submit that this proposition has no application to the facts of this case, and that the sole question in regard to the element of causation is whether circumstantial evidence of causation is sufficient to take this question to the jury, and on this point Appellees submit as their fourth and last proposition of law what they believe to be the correct and applicable rule that:

CIRCUMSTANTIAL EVIDENCE FROM WHICH A REASONABLE INFERENCE MAY BE DRAWN THAT APPELLANT'S NEGLIGENCE WAS THE CAUSE OF APPELLEE'S INJURIES IS SUFFICIENT TO TAKE THIS QUESTION TO THE JURY AND TO FORM THE BASIS FOR A JUDGMENT IN FAVOR OF THE APPELLEES.

PROPOSITION OF LAW NO. 1

IN DETERMINING WHETHER THE ACTION OF A TRIAL COURT, IN DENYING A MOTION FOR A DIRECTED VERDICT, IS ERROR, THE REVIEWING COURT WILL GIVE THE EVIDENCE THE MOST FAVORABLE CONSTRUCTION AND CONSIDER IT IN THE MOST FAVORABLE ASPECT TO THE APPELLEES, OF WHICH IT IS REASONABLY SUSCEPTIBLE AND WILL ASSUME AS ESTABLISHED ALL THE FACTS THAT THE EVIDENCE SUPPORTING THE APPELLEES' CLAIMS REASONABLY TENDS TO PROVE AND WILL DRAW IN FAVOR OF THE APPPELLEES ALL THE INFERENCES FAIRLY DEDUCIBLE FROM SUCH FACTS.

Vol. 3 American Jurisprudence
Sec. 944, 945

Kroeger et ux. v. *Union Indemnity Co.* (Ariz.)
14 Pac. 2d. 258, 259,
40 Ariz. 467

Gunning v. *Cooley,*
50 Supreme Court 231, 233
281 U. S. 90

Arizona Binghampton Copper Co. v. *Dickson* (Ariz.)
195 Pac. 538, 540, 542

Section 944, Volume 3, American Jurisprudence, on the subject "Appeal and Error" provides:

> "*Taking Case from Jury—In General.*—Generally, it may be said that a court must, in reviewing a ruling on a motion for a nonsuit, a demurrer to the evidence, or a motion to direct a verdict, view the evidence from a standpoint most favorable to the party objecting to the granting of such motion. * * *"

and Section 945 provides in part:

> "*Order Granting Motion.* —" * * * Thus, in passing upon the question whether a verdict should have been directed for the defendant, the reviewing court will assume as established all the facts that the evidence supporting the plaintiff's claims reasonably tends to prove, and that there should be drawn in his favor all the inferences fairly deducible from such facts; it cannot base its judgment on the defendant's evidence, or draw inferences favorable to him."

The rule set forth in the aforementioned text has been generally followed by the courts of this country. The Arizona Supreme Court has applied this rule many times where the trial court has granted a motion to direct the verdict and has repeatedly stated that in determining whether the Court should have directed a verdict for the defendant, the Appellate Court must construe the evidence most favorably for the plaintiff. *Kroeger et ux.* v. *Union Indemnity Co.,* supra.

In *Arizona Binghampton Copper Co.* v. *Dickson,* supra, (discussed in detail in connection with Appellees' Proposition of Law No. 4), the Arizona Supreme Court in deciding that the trial court had properly denied defendant's motion for directed verdict pointed out that:

"* * * A motion of this kind is regarded as admitting the truth of whatever competent evidence the opposing party had introduced, and challenging its sufficiency to support a verdict. If, therefore, the plaintiff's evidence and the reasonable inference therefrom, considered, as they must be on this motion, in the strongest light against the defendant, were sufficient to support a verdict, the motion was properly overruled. * * *"

This same rule has been applied by the United States Supreme Court in a number of cases. In *Gunning* v. *Cooley*, supra, the Court unanimously affirmed the decision of the Circuit Court and of the Trial Court denying defendant's motion for a directed verdict. In that case the Supreme Court stated the federal rule to be as follows:

"In determining a motion of either party for a peremptory instruction, the Court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them."

PROPOSITION OF LAW NO. 2

A STOREKEEPER HAS THE DUTY TOWARD ANY BUSINESS VISITOR TO ASCERTAIN THE ACTUAL CONDITION OF THE PREMISES AND, HAVING DISCOVERED ANY DEFECTS, EITHER TO CORRECT THEM BY REPAIR OR TO GIVE WARNING OF THE CONDITION AND THE RISK INVOLVED; AND A BUSINESS VISITOR, BEING ENTITLED TO EXPECT THIS CONDUCT ON THE PART OF A STOREKEEPER, IS NOT REQUIRED TO BE ON THE ALERT TO DISCOVER DEFECTS.

Volume 2, Restatement Law of Torts,
Sec. 343

Smith v. *Normart* (Ariz.)
75 Pac. 2d 38, 42
114 A.L.R. 1456

Cole et al. v. *Arizona Edison Co., Inc.* (Ariz.)
53 Ariz. 141
86 Pac. 2d 946, 947

Avery v. *S. Kann Sons Co.*
81 Fed. 2d 261, 262

Anderson v. *Sears Roebuck & Co.* (Minn.)
26 N. W. 2d 355

Lane Drug Stores, Inc. v. *Story* (Ga.)
35 S. E. 2d 472

Brunet v. *S. S. Kresge Co.* (C.C.A. 7th)
115 Fed. 2d 713

Houston Nat. Bank v. *Adair* (Tex.)
207 S. W. 2d 374

Rogers v. *Max Azen, Inc.* (Pa.)
16 Atlantic 2d 529

Volume 2, Restatement Law of Torts, Section 343, provides:

"Section 343. Dangerous Conditions Known to or Discoverable by Possessor.

* * *

Comment:

"d. What business visitor entitled to expect. A business visitor is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein. Therefore, a business visitor is not required to be on the alert to dis-

cover defects which, if he were a bare licensee, entitled to expect nothing but notice of known defects, he might be negligent in not discovering. This is of importance in determining whether the visitor is or is not guilty of contributory negligence in failing to discover a defect, as well as in determining whether the defect is one of which the possessor should believe that his visitor would not discover and as to which, therefore, he must use reasonable care to warn the visitor.

"e. *Preparation required for business visitor.* In determining the extent of preparation which a business visitor is entitled to expect to be made for his protection, the nature of the land and the purposes for which it is used are of great importance. One who enters a private residence even for purposes connected with the owner's business, is entitled to expect only such preparation as a reasonably prudent householder makes for the reception of such visitors. On the other hand, one entering a store, theatre, office building or hotel, is entitled to expect that his host will make far greater preparations to secure the safety of his patrons than a householder will make for his social or even his business visitors. * * *"

As was pointed out by Appellant in its brief (P. 21), the Arizona Supreme Court has announced the rule that it would follow the Restatement of Law where the Court was not bound by previous decision or by legislative enactment. *Smith* v. *Normart* (Ariz.) supra; *Cole et al.* v. *Arizona Edison Co., Inc.* (Ariz.), supra.

Appellant's brief (P. 19) sets forth as Appellant's Proposition of Law No. 2 that "A storekeeper is not liable for a customer's injuries where the dangerous condition alleged to have caused the injuries is as obvious to the customers as to the owner."

Appellees contend that such a rule of law would place a duty upon a business visitor of a storekeeper who has no knowledge of any defect or dangerous condition, nor any warning thereof, to be on the alert for such conditions. Such a rule would place upon business visitors a greater degree of care than that set forth in the Restatement. Appellees have found no cases which support the rule as set forth in Appellant's brief. Furthermore, if there were any such rule of law, it would have no application to the facts of the present case. While it is true that in the present case the chips in the doorway were not hidden, it does not follow that they thereby became as obvious to the Appellee, Mrs. Crandall, as they were to the storekeeper. Mrs. Crandall had never before visited the store (T-41) and, as shown by the pleadings (T-5, 6; T-10), on the occasion of her first visit, which resulted in her injury, she had entered the store by a different entrance, one in which the doorway was on the same level or grade as the sidewalk adjoining the store. The fact that Mrs. Crandall might have been able, had she been looking for a dangerous condition, and had she made an examination of the doorway, to have seen the chips, does not at all make these defects as obvious to her as they were to the storekeeper.

In *Avery* v. *S. Kann Sons Co.,* supra, plaintiff who fell over a crack in the linoleum on the top step of a flight of stairs testified "There was no difficulty in seeing the steps at the time of her fall." Nevertheless, plaintiff was permitted to recover and the verdict in her favor was affirmed.

In the present case, the chips were of an old origin (T-53) and the storekeeper who had a duty to ascertain that they were there, had had ample opportunity to

learn of this condition. It can hardly be argued that Mrs. Crandall had a similar or comparable opportunity as the storekeeper.

The cases cited by Appellant in support of its proposition of Law No. 2 (Appellant's brief PP. 20-23) involve plaintiffs who had either actual knowledge of the defect which allegedly caused the injury or had reason because of the circumstances to be on the alert for the defect or had visited the scene of the accident frequently prior to being injured and had had an opportunity to learn of the defect comparable to that of the defendant.

In *Anderson* v. *Sears, Roebuck & Co.,* supra, (Appellant's brief P. 22), plaintiff had ascended the defective step a short time before he fell over it on his return. Plaintiff had actual knowledge that the stair, which constituted a change in the floor level, (the alleged negligence of defendant) was there. These facts distinguish this case completely from the instant case.

In *Lane Drug Stores, Inc.* v. *Story,* supra (Appellant's brief PP 20, 22), plaintiff admitted having seen the stool over which she subsequently fell. In addition, the stool which was standing in the aisle was a fairly large object, being 12 inches high, 12 inches long, and 18 inches wide.

In *Brunet* v. *S. S. Kresge Co.,* supra, (Appellant's brief P. 20) plaintiff slipped and fell while descending some steps which were wet and muddy. In this case, as in the *Anderson* case, supra, plaintiff had ascended the steps only a few minutes before her fall and had actual knowledge that the stairs were wet and slippery. Not only did the plaintiff in the *Brunet* case have actual knowledge, but in view of the fact that it was a snowy

day and the steps were near the doorway, plaintiff had reason to expect the steps to be wet and slippery, and to be on the alert.

In *Houston Nat. Bank* v. *Adair,* supra, (Appellant's brief PP 21-22), not only was there no evidence as to how the stairs became slick, or that defendant's negligence caused it (this being the real basis of the decision), but in any event the plaintiff who had used the stairs a number of times over a period of several years, should have known of it. This case too differs from the present case in which Appellee, Mrs. Crandall, had never before been in the store and had never before used the exit in question.

In *Rogers* v. *Max Azen, Inc.,* supra, (Appellant's brief P. 20), plaintiff testified that she wasn't looking and that that was why she had not seen the protruding part over which she fell.

None of these cases places an obligation on a business visitor of a storekeeper to be on the alert for defects which he has no reason to expect. Nor do they set forth a rule of law that a business visitor can recover only if he injures himself on latent or hidden defects. At most, they stand for the proposition that a plaintiff who has actual knowledge of a dangerous condition or who has reason, because of his previous familiarity with that condititon or because of the nature of the condition, to expect a dangerous condition, cannot recover when he is injured by that dangerous condition.

PROPOSITION OF LAW NO. 3

THE QUESTION OF WHETHER A DEFECT, NO MATTER HOW SLIGHT, CONSTITUTES NEGLIGENCE, SHOULD BE SUBMITTED TO THE JURY IN ALL CASES IN WHICH IT AP-

PEARS THAT REASONABLE MEN MIGHT ARRIVE AT DIFFERENT CONCLUSIONS.

Dillow v. *City of Yuma,*
55 Ariz. 6
97 Pac. 2d 535, 536, 537

Cobb et al. v. *Salt River Valley Water Users' Assn.* (Ariz.)
114 Pac. 2d 904, 906

Jennings v. *Tompkins* (Mass.)
62 N. E. 265

Johnson v. *Fainstein* (Mass.)
107 N. E. 351

Loudon v. *Beaulieu et al.* (Mass.)
177 N. E. 806

Solomon v. *Boston Elevated Ry. Co.* (Mass.)
176 N. E. 810

Bohannon v. Leonard-Fitzpatrick-Mueller Stores Co., Inc. (N.C.)
150 S.E. 356

Stark et al v. *Franklin Simon & Co.,*
260 N.Y.S. 691

Lewis-Kures et al. v. *Edward R. Walsh & Co., Inc.,* (C.C.A. 2)
102 Fed. 2d 42

The Arizona Supreme Court, in the case of *Dillow* v. *City of Yuma,* supra (cited on Page 25 of Appellant's brief) sets forth the Arizona rule on this point, which is, according to the Arizona Court, in accord with the great weight of authority. After pointing out that there is a wide disagreement among the Courts as to when a defect may or may not be declared, as a matter of law, harmless, the Court quoted with approval the rule laid down in *Shugren* v. *Salt Lake City,* 48 Utah 320, 159 P. 530, 533:

"It seems to us that in case it is made to appear that reasonable men might arrive at different conclusions with regard to whether the maintenance of a particular defect in a sidewalk or street constituted negligence on the part of the municipality, the question should be submitted to the jury. That method is certainly quite as safe, and much more logical than to have courts as matter of law declare that the maintenance of a projection 2½ inches in height is not an actionable defect, while one of 3 inches or more is. Of course, there may be defects so slight and unimportant, or by reason of their location may be so unimportant, that a court might well say as matter of law that the maintenance thereof did not constitute negligence on the part of the municipality. Under such circumstances, however, reasonable men may not differ. However unsatisfactory the foregoing test may be, yet it is the only practical, and, all things considered, the fairest test that courts have been able to evolve."

The Court then went on to say that:

"We believe the above to be a fair statement of the rule in most jurisdictions at the present time," and then added that

"We do not list the numerous cases that have passed upon the question, but we have no doubt that the great weight of authority coincides with the view we have expressed."

The Court, after stating the above to be the correct rule, went ahead to find in the case in question that since reasonable men might have concluded that the defect was dangerous, the Trial Court had acted improperly in directing the verdict for defendant.

The rule laid down in *Dillow* v. *City of Yuma* has been applied by the Arizona Supreme Court in subsequent cases where the defendant was some one other

than the city. In the case of *Cobb et al.* v. *Salt River Valley Water Users' Assn.,* supra, the Court quoted approvingly from *Dillow* v. *City of Yuma,* and reversed the Trial Court's directed verdict for the defendant, pointing out that since reasonable men might have differed in the case, the question of whether the maintenance of the particular defect was negligence, should have been submitted to the jury.

In the instant case, the evidence showed that there were two chipped out places on the inner part of the metal threshold, one of them being about 2⅜ inches and the other about 1½ inches in size. Certainly under these facts reasonable men could have concluded that the defects constituted negligence and that Appellant had the duty to repair the defects or give warning of them.

Appellant states in its brief (Page 23), as its third Proposition of Law, that "Slight and inconsequential defects do not constitute negligence." It is true that in a few jurisdictions, the courts have undertaken to fix the dividing line to the fraction of an inch between defects which are negligence and those which are not. One of these jurisdictions is the State of Massachusetts, where the Court held that a projection by a nail or nails of 3/16ths of an inch is not negligence. *Jennings* v. *Tompkins,* and *Johnson* v. *Fainstein,* supra (cited in Appellant's brief PP 24-25). The same Court, a number of years later, held in the case of *Loudon* v. *Beaulieu et al.,* supra, that where the plaintiff fell on a stairway by catching her heel, and where the only defects shown were a sticking up of the brass nosing "½ inch or a little better" and the sticking up of a screw "less than ½ inch," enough of a defect existed to present a question of fact for the jury. The Court said:

"The cases of Jennings vs. Tomkins, 180 Mass. 302, 62 N. E. 265, and Johnson v. Fainstein, 219 Mass. 537, 107 N. E. 351, cited by the defendants are distinguishable in their facts from the case at bar."

In the case of *Solomon* v. *Boston Elevated Ry. Co.,* supra, the Massachusetts Court found that the projecting of a broken metal safety tread which had broken away from its main part and extended outward from the edge of the step over which plaintiff fell was a sufficient defect to submit to a jury, even though the extension was only ¾ths of an inch. Apparently the rule in Massachusetts is that a defect of 3/16ths of an inch is not negligence, whereas one of approximately ½ of an inch or ¾ths of an inch is. Even if this were the law in Arizona, the judgment in the present case should still be affirmed, because the defect here was greater than 3/16ths of an inch.

The other cases cited by Appellant in support of its Proposititon of Law No. 3 (Appellant's brief PP 24-25) also illustrate the split of authority on this question. It should be pointed out, however, that each of the cases cited by Appellant involved a defect considerably smaller than the one in the present case.

In *Bohannon* v. *Leonard-Fitzpatrick-Mueller Stores Co., Inc.,* supra (Appellant's brief P. 26), the alleged defect consisted of a metal strip 1/16th of an inch higher than the surface of the step.

In *Stark et al.* v. *Franklin Simon & Co.,* supra, the alleged defect consisted of ½ inch spaces between metal strips placed on the linoleum covering the steps.

And in *Lewis-Kures et al.* v. *Edward R. Walsh & Co., Inc.,* supra, (Appellant's brief P. 24), not only was the crack in the step smaller than the defects in the

present case, but the actual decision reversing the judgment for the plaintiff and directing a verdict in favor of the defendant, was not based on the size of the defects, but on the fact that there was no evidence that the defendant had actual or constructive knowledge either of the cracks or of the litter and debris which were on the step, and on the further fact that plaintiff had actual knowledge of the presence of the litter and debris over which she fell.

Appellees respectfully submit that the rule laid down in the case of *Dillow* v. *City of Yuma,* supra, which is the Arizona rule, is supported by the better and greater weight of authority, and that under this rule the question of whether defects of the size involved here were negligence was for the jury.

PROPOSITION OF LAW NO. 4

CIRCUMSTANTIAL EVIDENCE FROM WHICH A REASONABLE INFERENCE MAY BE DRAWN THAT APPELLANT'S NEGLIGENCE WAS THE CAUSE OF APPELLEE'S INJURIES IS SUFICIENT TO TAKE THIS QUESTION TO THE JURY AND TO FORM THE BASIS FOR A JUDGMENT IN FAVOR OF THE APPELLEES.

Volume 38, American Jurisprudence, Negligence Sec. 334

Town of Flagstaff et al. v. *Gomez* (Ariz.)
202 Pac. 401, 405

Arizona Binghampton Copper Co. v. *Dickson* (Ariz.)
195 Pac. 538, 540, 542

Inspiration Consol. Copper Co. v. *Conwell* (Ariz.)
190 Pac. 88, 90

Gunning v. *Cooley,*
50 Supreme Court 231, 234
281 U. S. 90

Owl Drug Co. v. *Crandall et al.* (Ariz.)
52 Ariz. 322,
80 Pac. 2d 952, 955

Selby v. *S. Kann Sons Co.,*
73 Fed. 2d 853

Sellew v. *Tuttle's Millinery, Inc.* (Mass.)
66 N. E. 2d 26, 28

Simpson v. *Hillman et al.* (Ore.)
97 Pac. 2d 527, 530

Shephard v. *Great Atlantic & Pacific Tea Co.,*
(Ky.)
205 S. W. 2d 687, 688

Weber v. *Valier & Spies Milling Co.* (Mo.)
242 S. W. 985

Relahan v. *F. W. Woolworth Co.* (Kan.)
67 Pac. 2d 538, 540

Volume 38, American Jurisprudence. Negligence. Section 334, on the subject "Proximate Cause" provides:

> "In accord with the rule governing proof of negligence generally, proximate cause need not be established by the testimony of eyewitnesses, nor by direct or positive evidence, but may be proved by circumstantial evidence; it may be determined from the circumstances of the case."

This rule, which is generally accepted by the courts of this country, has been followed by the Arizona Supreme Court in a number of cases.

In *Town of Flagstaff et al.* v. *Gomez,* supra, the plaintiff brought an action as the father of his fifteen months old child who had died as a result of drowning by

falling in an open sewer manhole. The plaintiff alleged negligence on the part of the defendant in leaving the manhole unguarded. There was no evidence of any sort showing how the child had fallen into the manhole, as no one had seen the accident. There was evidence that 10 or 12 minutes before the child's body was discovered, it had been seen in the street about halfway between the gate of its yard and the open manhole, and that after the child's body was taken from the manhole, water ran from its mouth and nose.

Even though there was no direct evidence of how the accident had occurred, nor was there any direct evidence establishing that the failure to guard the excavation was the proximate cause thereof, nevertheless, the Court held that the trial court had acted properly in denying defendant's motion for directed verdict. The Court said there was sufficient evidence of proximate cause to take this matter to the jury, pointing out that

> "No one, it is true, saw it fall in, but the fact that it was seen in the street near the manhole alone almost immediately before that and found a very few minutes afterwards, with nothing to suggest, even remotely, that a passing vehicle might have knocked it in accidentally or some other child pushed it in while playing, in connection with the other evidence in the case, leads to the conclusion that the child, too small to appreciate danger, while walking along or across the street, fell in the water because of the unprotected excavation. And, since 'that cause is proximate without which the accident would not have happened' (Inspiration Consolidated Copper Co. v. Conwell, 21 Ariz. 480, 190 Pac. 88), the facts justified submitting to the jury the question whether the negligent omission to protect the excavation was the proximate cause of the child's death, for 'proximate cause is a question of fact for the jury and may be inferred from cir-

cumstantial evidence if it is substantial.' Arizona Binghampton Copper Co. v. Dickson, 22 Ariz. —, 194 Pac. 538."

In *Arizona Binghampton Copper Co.* v. *Dickson,* supra, defendant had furnished a ladder which was being used by plaintiff's intestate on the date of the accident. Plaintiff's intestate and another man named Chapman were heard to fall and were then found unconscious at the bottom of this ladder. Neither one lived to tell how the accident happened, nor were there any witnesses. The ladder was about 130 feet high, and after the accident four rungs of the ladder about 50 feet up were discovered to be broken in two in the middle, and the one immediately above was pulled loose from the side of the ladder at one end, the nails being pulled out with the rung. Defendant argued that assuming the defects were due to the negligence of the defendant, there was no proof that these defects were the proximate cause of the accident and that to so find it would be necessary to indulge in "presumptions resting on the base of another presumption."

The Court, in affirming the decision of the Trial Court in denying the motion of the defendant for a directed verdict, said:

"From these proven facts the jury must inevitably have inferred or concluded that deceased had progressed in his ascent until his weight rested upon the rung that pulled out of the wet and rotten upright, and when that occurred, in an effort to prevent falling, the deceased successively grasped the four rungs beneath, only to have them, under the impact of his weight, break asunder, and in the meantime, the momentum of his body eluding all further efforts, he yielded to the inevitable and fell to his death. Such a conclusion would be an immediate and rational inference from the facts and

circumstances proved. We have recently decided that the proximate cause is a question of fact for the jury and may be inferred from circumstantial evidence if it is substantial. Inspiration Cons. Copper Co. v. Conwell, 190 Pac. 88. See, also, Valiotis v. Utah-Apex Mine Co. (Utah) 184 Pac. 802.

"The law is not so exacting as to require every fact and circumstance going to make up a case of negligence, or to identify the proximate cause, to be proved by eye-witnesses or positive, direct testimony."

It should be pointed out that in the case above cited, there was no evidence to show that plaintiff's fall had not been caused in another way. For example, the plaintiff might conceivably have climbed higher on the ladder and fallen at a point where there was no flaw in the ladder and have broken the rungs of the ladder on the way down. The fact that this might possibly have happened did not cause the Court to direct a verdict for the defendant or to take the question of proximate cause from the jury.

In *Inspiration Consol. Copper Co.* v. *Conwell,* supra, plaintiff sought damages for the death of his intestate, Lawrence Conwell, alleged to have been caused by defendant's negligence. Conwell was a motorman in the service of the defendant. On the day of the accident, there was a derailment of two of the loaded cars attached to the motor Conwell was driving. The two cars derailed were immediately behind the motor. As a result of the derailment, the motor was violently jolted and jarred. After the accident, Conwell was found behind the motorman's seat between the motor and the first car, his body crushed. No one saw how the death of Conwell occurred. Plaintiff argued that the derailment was caused by defendant's negligence and that

Conwell had been unseated by the jolting of the car and had fallen between the car and the motor and was thus crushed. Defendant argued that Conwell might have been standing up and accidentally overbalanced, or he might have been seated and become pinned between the car and the motor while reaching from his seat to rescue a chain that might have dropped off the pan on the motor. There was no direct testimony to substantiate either of these theories. Despite the argument that "in the absence of direct evidence it was a mere guess or speculation as to how Conwell came to his death," the Court affirmed the ruling of the Trial Court in denying defendant's motion for a directed verdict. The Court said:

> "Conceding, as we do, that it was not for the jury to guess or speculate as to the cause of the accident, we think it is far more reasonable to suppose, and the jury, in our opinion, might well have inferred, that the jolt of the derailment caused Conwell to lose his seat and fall between the car and the motor, or between the safety post and the car, and that he was thus crushed and killed. * * * In our opinion, the evidence was sufficient to send the case to the jury upon this point, and we think that the jury was warranted in finding, as they must necessarily have done, that Conwell was killed by the derailment of the cars without any intervening cause such as suggested by the defendant."

The Court then added that:

> "* * * Proximate cause is a question of fact, and a question for the jury if there is substantial evidence from which it may reasonably be deduced that the negligence shown was the proximate cause of the injury complained of. In short, proximate cause may be determined from circumstantial evidence. * * *"

The rule that proximate cause may be established by circumstantial evidence has been followed by the United States Supreme Court. In *Gunning* v. *Cooley,* supra, the Court held that the question of proximate cause was properly left to the jury and that the defendant's motion for a directed verdict had been properly denied, even though there was no direct evidence that the defendant's alleged negligence had caused the injury complained of. In that case, although plaintiff had alleged and testified that defendant, a doctor, had negligently treated her by placing acid in her ears, there was no testimony of any sort showing that this alleged negligence had caused the perforations of the ear drum or the permanent deafness which were the alleged injuries. On the question of proximate cause, the Court stated:

> "It was not necessary for the trial court, in passing upon the motion *(defendant's motion for directed verdict) to determine, and we need not consider, whether under the rules laid down in the decision of this court the evidence was sufficient to warrant a finding that the perforations of either eardrum or permanent deafness resulted from defendant's treatment."

* Words in parentheses added.

The Court said it was sufficient to take the question of negligence to the jury that plaintiff had testified regarding the treatment she had received from the defendant and how this treatment affected her; and the fact that she stated the treatment made her dizzy and created noises in her ears was enough to permit the jury to infer that her subsequent condition, of which she was complaining, namely, the perforation of her ear drum and the permanent deafness, was proximately

caused by the said treatment even though there was no direct testimony to that effect.

Appellant has set forth as its First Proposition of Law that "Where evidence shows that plaintiff's injuries may have resulted from one of several causes, and that only one of causes can be attributed to defendant's negligence, plaintiff cannot recover."

If, by this Proposition of Law, Appellant contends that it is not proper to submit the question of proximate cause to the jury in a case where there is no direct evidence of proximate cause, but in which there is evidence from which proximate cause may reasonably be inferred, then Appellant's Proposition of Law is not a correct one; and if Appellant does not intend that such a conclusion be drawn from its Proposition of Law, then this proposition has no application to the present case. In the present case, there was no evidence of several possible causes of the injury. There was evidence of only one possible cause, that being the defects in the threshold over which Appellee, Mrs. Crandall, fell. The other so-called possible causes exist only in the imagination of Appellant, and not in the evidence.

None of the cases cited by the Appellant in support of its proposition (Appellant's brief PP 12, 13, 14) is in point with the facts of the present case.

In *Owl Drug Co.* v. *Crandall et al.,* supra, (Appellant's brief P. 12) plaintiff stumbled and fell while getting down from a stool at defendant's lunch counter. Subsequently, and while defendant's employees were endeavoring to assist her to arise, she fell again. There was no claim that defendant was responsible for the first fall, nor was there any evidence that the second fall was caused by defendant's negligence, as claimed

by the plaintiff. The Court, after pointing out that there was no evidence that the second fall was due to defendant's failure to use reasonable care and that all of the available evidence indicated that defendant's employees had done the best they could, concluded by saying that:

> "We are satisfied that the plaintiffs have failed to make out a case of negligence and for that reason the judgment is reversed."

In its dicta, the Court did point out that even if it had been established that defendant was guilty of negligence in connection with plaintiff's second fall, that there was no way of establishing which of the falls had caused the injury, although the Court does intimate that it was more reasonable to conclude that the fractured femur resulted from the first fall rather than the second one. In the absence of any direct evidence or any circumstantial evidence from which it could reasonably be inferred that the second fall, rather than the first one, caused the injuries, plaintiff could not recover.

In the case of *Selby* v. *S. Kann Sons Co.,* supra (discussed on Page 13 of Appellant's brief), the actual basis for the Court's decision was the fact that there was no evidence of any sort to show that the alleged defect had existed long enough for defendant to have constructive notice thereof, nor was there any evidence to show that defendant had actual notice of the alleged defect. In the absence of such evidence, there was no basis for finding that the defendant was guilty. of any negligence.

In the case of *Sellew* v. *Tuttle's Millinery, Inc.,* supra (Appellant's brief P. 13), plaintiff slipped and fell down the stairs in defendant's store. There was evi-

dence that the step on which she fell was dirty and that it had "an accumulation of dirty little papers." The basis for the decision affirming the directed verdict for the defendants is that there was no evidence at all of any negligence on the part of the defendant. The fact that the stairs were dirty did not warrant a finding that the steps were slippery or dangerous or that defendant was negligent. The Court in its dicta did go on to state that there was no evidence of any causal connection between the dirty condition of the stairs and the fall of the plaintiff.

In *Simpson* v. *Hillman, et al.,* supra (Appellant's brief PP. 13, 14), again the true basis of the decision was the complete lack of any evidence to show that the defendant was guilty of any negligence, and not the lack of evidence of the question of proximate cause. In that case, a 3½ year old girl was injured as the result of an automobile accident. There was no evidence at all to show how the accident had occurred. No one saw the accident; nor did anyone know whether the girl had been hit by the car or whether she had run into the side of the car. The driver of the car could shed no light on the matter; he had no knowledge of having hit the girl, and his first knowledge of the accident came when he felt a bump on the right side of the car, "kind of like the car had run over some object." The only available evidence indicated that the car was being driven at a reasonable speed; nor was there any evidence to show that the driver failed to use ordinary care to keep a lookout for pedestrians. After discussing the complete lack of any evidence of negligence on the part of the defendant, the Court concludes by saying:

> "After careful consideration of the record, we have reached the conclusion that there was no sub-

stantial evidence tending to show that the defendants were negligent in one or more particulars as charged in the complaint."

In *Shephard* v. *Great Atlantic & Pacific Tea Co.,* supra (Appellant's brief Page 12), there was also no evidence of any negligence by defendant. Plaintiff had slipped on a banana peel in an alley behind defendant's store. Whoever had dropped or placed it there was guilty of negligence, but there was no evidence to identify the guilty party.

Weber v. *Valier & Spies Milling Co.,* supra (Appellant's brief Page 12) is an action for damages for the death of plaintiff's father, an employee of defendant. The alleged negligence was in the failure of defendant to guard the opening of a man-hoist, which defendant had provided, between the second and third floors. There were no witnesses to the accident. Deceased's body was found on the second floor near the opening of the hoist, and near the bottom of the stairway leading from the second to the third floor. There was no way to ascertain from the position of his body or from the nature of the injury which caused his death, whether he had fallen down the unguarded hoist or down the stairway. The evidence indicated and the Court found that either alternative was equally likely. It was not alleged that there was any negligence in connection with the construction or maintenance of the stairway. Furthermore, deceased's injury showed that he had fallen on his head, which would not have happened if deceased fell through the unguarded opening, unless in the process of falling he caught his foot in the hoist, thus causing him to turn upside down and land on his head. There was a third possible explanation of the accident. Deceased could have gotten on the hoist to

use it in a normal manner and have fallen off. There was no claim that the hoist was not properly constructed and maintained for use in the manner for which it was intended.

In *Relahan* v. *F. W. Woolworth Co.*, supra (Appellant's brief Page 12), plaintiff fell down stairway in defendant's store. She said she slipped on some paper which appeared to be similar to the wrapping on Hershey Chocolate Bars, and further testimony was offered to show that defendant sold such chocolate bars at a counter on the floor above the steps where plaintiff fell. On this state of facts, the Court held that there was not sufficient evidence of any negligence by defendant because there was no evidence to show that the papers had been on the steps long enough for defendant to have had notice of them, nor was it shown that the paper on the steps was slick or dangerous to persons coming in contact with it.

It is obvious that none of the cases discussed above, and cited by Appellant, is authority for taking from the jury the question of proximate cause in the instant case. Here there is clear and direct evidence of negligence by defendant, and the facts and circumstances of the case are such that reasonable men could infer that it was this negligence which caused injury to Appellee, Etta Crandall. Appellant has failed to cite any case applicable to the facts in the instant case which would justify taking the case from a jury. In the case at bar, the evidence shows only one probable cause of the injury complained of, and that is the defective threshold. There is sufficient evidence from which the jury could reasonably have found, as they necessarily must have done, that Appellee, Mrs. Crandall, caught a part of her foot in one of the chipped out places in the threshold,

and was injured as a result thereof. The accident is clearly shown to have occurred on that threshold. There is no evidence at all of any foreign substance which might have caused it, or of any pushing, shoving or tripping by any person, nor is there any evidence at all to support the other theories of possible causation offered by the Appellant.

Appellees consider it very significant that the jury which had a view of the threshold rejected Appellant's argument that perhaps some other portion of the threshold might have caused Mrs. Crandall's fall, thus rejecting each of the very improbable guesses Appellant made.

Respectfully submitted,

BROWN & LANGERMAN

By: Samuel Langerman

Attorneys for Appellees